New Owner Clean Air Act Audit Program for Oil and Natural Gas

Exploration and Production Facilities - Summary of Stakeholder Comments Received

Comments about the Oil and Gas New Owner Audit Program and Draft Standard Agreement Template

Programmatic Considerations

• Multiple commenters suggested that the Oil and Gas New Owner Audit Program (Program) should require an independent auditor instead of a self-audit.

• If the EPA denies a company's request to include additional purchases after the Program is complete, the EPA should allow the company to begin a new audit.

• The Draft Agreement (or Agreement) saddles new owners with entirely new and onerous requirements in order to use the Audit Policy.

• Multiple commenters suggested that the scope of the audit should be determined by the regulated entity. A policy dictating the scope of the audit serves as a disincentive given the voluntary nature of the self-audits.

• Flexibility in performing additional audits and incorporating additional facilities into the audit is needed: operators should be able to choose to enter into a new audit Agreement for newly acquired facilities; and, if there are a small number of facilities acquired after entering into the Agreement, the operator should be allowed to include those into the existing Agreement.

• A participating operator should be able to terminate an audit whenever it wants.

• The "date of acquisition" part is unnecessary if the EPA does not limit the Agreement to new owners only.

• Use of "immediate and substantial endangerment to public health or welfare of the environment" is not appropriate in a voluntary self-audit because it comes from consent decrees.

• The EPA should consider expanding the Program beyond new acquisitions to routine audits. Expanding the Program beyond new acquisitions would have a larger impact as new owner disclosures represent a much smaller subset of voluntary disclosures.

• Multiple commenters appreciated the added clarity to the Draft Agreement Template as opposed to the 2008 New Owner Audit Policy.

• Multiple commenters stated that the Agreement should specifically state to what extent the Audit Policy of 2000 or the New Owner Policy of 2008 can be used to provide context and meaning of the Draft Agreement.

Clarifications Sought

• Multiple commenters noted that Paragraph 5 of the Agreement states that Facilities must follow the agreed upon provisions of the Clean Air Act. However, there is no indication which provisions of the Act are referenced and clarification is needed. The Draft Agreement should include the process by which the new owner is supposed to obtain approval from the EPA of the specific statutory, regulatory and permit provisions.

• Clarify the definition of "eligible facilities."

• Elaborate on the types of violations that can be resolved under the Program and a flexible schedule for compliance.

• Clarify that a source without an API Well ID can still be included in the program - GPS coordinates for each site are enough if there is no API Well ID.

• Multiple commenters sought clarification on whether the protections from penalties will continue for the new owner if the stake in the facility is sold.

• Multiple commenters stated that the Draft Agreement should define what "discovery" of violations constitutes. For single facilities, the EPA should clarify that "discovery" of a violation takes place no earlier than when the new owner has knowledge of a violation. For multiple facilities, the EPA should provide that "discovery" occurs when the new owner completes its audit of the facilities and submits a report to the EPA

summarizing the company's findings for given regulatory programs.

• Multiple commenters sought clarification as to what constitutes "corrective actions" in the context of permitting obligations. These commenters believe it should mean that a timely submitted permit application suffices as corrective actions for a facility. They also believe that companies should be able to take into consideration emissions controls that they will install in the future when submitting permits rather than submitting a permit modification once the controls are installed. These commenters would also like to know if the Agency will coordinate with state permitting authorities in evaluating whether a corrective action is acceptable.

• Multiple commenters suggested that the EPA should clarify whether penalty forgiveness is complete. The Agreement should include a statement that companies will not be responsible for economic benefit post-acquisition if the companies identify violations within the timeframes and complete corrective actions.

• Multiple commenters suggested that the Draft Agreement clarify that new owners do not have to discover violations through a periodic review of their facilities.

• Multiple commenters stated that the EPA should clarify that new owners make applicability determinations based on post-acquisition data they gather. The Agency should also provide companies with sufficient time in which to make such determinations.

• Multiple commenters stated that the EPA needs to clarify whether its audit obligations should include monitoring and reporting obligations that would exist independent of any audit agreement. The EPA also needs to clarify whether violations discovered based on other Clean Air Act monitoring and reporting programs should qualify for Audit Policy protection or whether these violations cannot be considered voluntarily discovered.

• Multiple commenters want new owners to be able to provide basic facility information up front, rather than resubmitting all the information every time a new violation is discovered. They would like clarity regarding the requirement to include in the final reports a discussion of the corrective actions related to Appendix B(5)(A): are those corrective actions are subject to the negotiated timeline for engineering and design issues?

• Clarify the interplay between federal and state audit program participation.

• Multiple commenters sought clarification about the reference in Appendix C to "audit instruments" and how it related to audit protocols and audit checklists, and details should be provided on what an audit checklist is.

Compliance Considerations

• This is an overly stringent compliance paradigm - e.g., requiring facilities to determine and design for potential peak and minimum instantaneous vapor flow rate. This will cause properly operating systems to become ineffective during standard operations.

• Infrared (IR) camera inspections with no emissions should suffice in place of engineering and design evaluations.

• Appendix B is similar to 2015 and 2016 settlements that have never been subject to public comment, scrutiny, or scientific peer review.

• Engineering design standards are too uniform and prescriptive, not based on science, and unreasonably burdensome.

• Appendix B presupposes that any violations will be with the vapor control system and requires compliance, regardless of the type of violation. Compliance terms should be negotiated.

• Participating companies seeking penalty mitigation may be required to conduct analyses and corrective actions that do not appear to be based on any federal statutory or regulatory requirements, and may be more stringent than is required under federal statutes or regulations.

• Why did the EPA decide against basing the model audit elements on existing federal regulatory requirements?

• Why does the EPA believe that the analyses and corrective actions outlined in Appendix B should be required to demonstrate compliance and receive penalty mitigation?

• With what regulation or requirement is the EPA attempting to measure compliance?

• Is Appendix B intended to help protect companies from future enforcement under the General Duty Clause?

• The Draft Agreement creates an entirely new standard of compliance unconnected to any federal statutory or regulatory requirement applicable to oil and gas.

• Some participants will be unable to negotiate away default EPA requirements.

• Do not finalize Appendix B. If the EPA wants to finalize Appendix B, it should be based exclusively on federal Clean Air Act regulations promulgated for those sources - refer to the EPA's proposed amendments to the Federal Implementation Plan for Indian Country.

• The Draft Agreement seems to mirror the Colorado Air Pollution Control Division's Storage Tank and Vapor Control System Guidelines, which are voluntary, but would be mandatory in the Draft Agreement.

• The Program is too prescriptive and starts from a punitive point - this will discourage companies from using it. The Program will increase enforcement uncertainty. Companies should have greater leeway to set what they audit and disclose.

• Both a facility control design analysis and optical gas imagining camera verification are required in both the New Source Performance Standards (NSPS) and the Program. How

will these requirements impact an operator who joins the Program; would completion of one under the NSPS suffice for the Program?

• Any item requiring EPA approval should be considered approved after providing the EPA with the required timeframe to review the provided information if the EPA has not given any further comments.

• The EPA should be cautious using an agreement that draws requirements from recent consent decrees (essentially the Colorado consent decrees). The Draft Agreement will discourage operators from using the Program.

• Appendix B transforms the Program into a process to create "new regulation," and it includes so many requirements it will take at least two years to complete.

• Broad discretion to assess sufficiency of the audit conducted discourages use of the Program.

• Multiple commenters stated that making compliance with Appendix B mandatory creates a disincentive for use of the Program. Appendix B requirements are not an express requirement in many gas and oil jurisdictions and are extracted from Colorado settlement agreements.

• New methodologies for assessing vapor control systems will not be available for facilities under the Program and Agreement.

• In most jurisdictions there is no federal or state regulatory requirement that could be cited for the requirement to provide a specific citation that supports a potential engineering and design violation.

• All references to a discrete methodology should be removed.

• Field survey and IR camera verification requirements to confirm engineering and design analysis should be removed: field survey is extraneous; certification that VCS is adequately sized and functioning is sufficient to show corrective action was completed.

• Multiple commenters suggested that the Vapor Control System Verification requirement in Appendix B, Paragraph 5 is unnecessary.

• Multiple commenters suggested that the Program should only be used to correct violations - the failure to conduct engineering and design analysis when required.

• Multiple commenters suggested that the requirement to replace compromised equipment

is beyond the scope of an audit.

• Multiple commenters suggested including language prohibiting the EPA from using audit results to pursue enforcement actions against the prior owner and operator.

• The Draft Agreement should not specify the methodology used to correct the violation.

• The vapor control system Field Survey standard operating procedure is unnecessary and extraneous.

• Use of word "conditions" in Paragraph 12 is too broad.

• Appendix B's structure will result in limited interest and undermine compliance efforts. Appendix B seems to combine elements of state regulations and EPA consent decrees. Both exceed the requirements of current federal regulation requirements.

• Multiple commenters suggested that where a significant number of facilities are involved and numerous violations are likely, parties should be able to propose a schedule for addressing certain types of corrective action before each violation is

discovered. The NSPS at 40 C.F.R. Part 60, Subparts OOOO and OOOOa requires actual and potential-to-emit data shortly after a unit commences operation. The EPA should allow sources to determine the throughput and/or potential-to-emit during the post-acquisition Audit Program. This would allow for more reliable data than the data they received from the seller.

• The program should cover issues discovered during the pre-acquisition due diligence period.

General Comments

• Several commenters expressed general support for the Program.

Recordkeeping and Reporting

• The facility should provide all paperwork to the state, including semi-annual reports and the final report when the Program is complete.

• Participating new owners should provide the EPA with the cost of returning to compliance.

• Participating new owners' obligation under Appendix C recordkeeping requirements should be met after showing that it had informed contractors and agents of obligations to maintain documents/records.

• Notice of transfer of a facility should not be required to be sent prior to the transfer of ownership/operation. The EPA does not have authority to prevent the transfer.

• For providing notice of a transfer of more than 50% equity interest in a facility included in the Agreement: the EPA only needs to know if a particular facility is no longer included in the Audit Agreement.

• Recordkeeping requirements in Appendix C are too prescriptive and extensive: they will create a disincentive to participate because it is so burdensome.

• Proposed certification requirements in Paragraph 26 will have a chilling effect on use of the Program - it is too burdensome and complex.

• Multiple commenters suggested that the EPA should not need to approve transferring the Draft Agreement to a new owner - notification is enough.

• Entering into the Draft Agreement and complying with reporting requirements should not waive the attorney-client privilege.

• Paragraph 26 certification requirement is too broad.

• Multiple commenters suggested that the Appendix C requirement to track the costs incurred of returning to compliance is unnecessary. If the EPA continues to require this information, then the EPA should only ask for an estimate and the costs should not be broken down into categories.

Suggested Changes

• "Tank System" should be redefined in the appendix to include tanks that do not have a vapor control system.

• Multiple commenters suggested that all definitions associated with Appendix B and engineering and design issues should be eliminated.

• Multiple commenters suggested the following regarding Appendix C: eliminate Paragraph 1, the requirements are unnecessary; revise Paragraph 3 to clarify that an operator does not need to submit semi-annual reports after the final report has been submitted; identifying costs of returning to compliance is unnecessary; and identifying pollutant reductions is not relevant or necessary, and it will have a chilling effect.

• Multiple commenters suggested that Paragraph 14 be changed to indicate that the submission of the Final Report required by Appendix C will constitute the completion of the Audit Program. These commenters would also like the EPA to issue its Final Determination within a fixed period of approving the new owner's Final Report. They also believe that the provisions of Paragraph 14 would better placed in Section 5 and merged into Paragraph 22.

• Appendix B, Paragraph 4.A., "Potential Minimum Instantaneous Flow Rate," is a typo and should be, "Potential Minimum Instantaneous Vapor Flow Rate."

• The Audit Instruments requirement by Appendix C, No. 1 is similar to the Field Survey SOP required by Appendix B, No. 3. References should be inserted in each of these sections so that companies aren't developing multiple documents.

• One commenter developed an alternative set of guidelines that would incentivize new operator compliance with the Clean Air Act that is more flexible and common sense.

• Multiple commenters suggested that the EPA remove Appendix B.

• Multiple commenters suggested eliminating the prohibition on the appeals process found in Section IV, Number 16.

• Include a venue provision regarding jurisdiction.

• The Appendix A definitions should include technological advancements.

• The EPA should work with stakeholders to develop a clear, but sufficiently flexible, definition of "engineering and/or design issues."

• Add a provision to allow adding facilities into the audit program if they are discovered during the audit process - it is not uncommon to discover additional assets during the audit that were previously believed to be abandoned or not in use.

• Amend Paragraph 12 to show that operators can still receive Draft Agreement benefits for disclosed violations that present an immediate and substantial endangerment.

• State in Paragraph 22 that the Draft Agreement terminates upon operator's receipt of the EPA's Notice of Determination.

• Multiple commenters suggested that the EPA should not require companies to use the Audit Agreement Template, and, instead, allow companies to develop a custom audit agreement to provide additional flexibility.

• The requirement of parties to address conditions "that may present" an imminent and substantial endangerment to the public is overly broad. This paragraph should mimic the Clean Air Act which only requires sources to address imminent and substantial endangerments that are present.

• In Paragraph 17, the correct citation in the last sentence should read, "in accordance with Section 3 and Appendix B," rather than "in accordance with Section 4 Appendix B."

• Paragraph 22 is confusing because it purports to resolve a company's civil penalty liability by not imposing a civil penalty. The commenter suggests revising the sentence

to read, "Pursuant to this Audit Program and as an exercise of enforcement discretion, EPA will then resolve [COMPANY'S] civil penalty liability for the disclosed Violations that are satisfactorily corrected consistent with this Agreement's requirements."

Timeframes

• The amount of time to correct engineering design issues in Paragraph 11 is too long and should be specified as an exact number of days.

• Multiple commenters suggested that the six-month period should be extended to nine months when referencing Section II, Number 4.

• Establish a finalization date for the Program.

• Multiple commenters suggested that the EPA extend the corrective action period beyond 60 days. Sixty days for completing all corrective actions is not enough.

• Additional time flexibility should be built into the schedule to complete the audit due factors such as location, season and accessibility.

• New owners need certainty that they can negotiate workable deadlines with the EPA. Establish minimum default deadlines for new owners.

• Give new owners time to assess the site after acquisition to determine an appropriate period to evaluate compliance status.

• Timeframe for audit completion should not be dictated.

• Eliminate the 60-day corrective action deadline for violations unrelated to engineering or design issues: just agree from the beginning on a number of days.

• The EPA should have a discrete time to issue the Notice of Determination.

• The EPA should provide an extension for corrective actions involving engineering/design issues. Paragraph 10 for non-engineering/design issues under the Corrective Actions section of the policy allows an extension to be submitted, however Paragraph 11 for engineering/design issues does not.

• The EPA should add an Agency response timeline to extension requests. In instances where a company submits an extension request, a requirement for the EPA to respond in a timely manner should be added because this would provide certainty for the company requesting the extension - the timeframe should be 10-Agency-working-days.

• Multiple commenters suggested that the Draft Agreements requires companies to notify EPA within six months of acquisition, however the notice requirement is not clear. Clarification on what the notice should provide is needed, as well as whether the notice requirement would be triggered upon determination that a violation may have occurred. Additional clarification is needed as to what occurs after notice is provided.

• Multiple commenters suggested that that even though the Draft Agreement allows for extensions of the 60-day deadline for corrective action, it should also allow for extensions in other deadlines in the Agreement.

• Multiple commenters suggested that Facilities should have nine months to enter into an Audit Agreement rather than six months.

Comments about Delegated Authority and State Authority Considerations

• The Draft Agreement should include a disclaimer that the EPA will not second guess state audit policy procedure/outcomes and will not impose penalties different from those agreed to by the state.

• One commenter supported this voluntary Program incentivizing Clean Air Act compliance, but opposed it as an EPA-led effort. It should be left to the states. Texas has a model self-disclosure program: the Environmental, Health and Safety Audit Privilege Act.

• One commenter sought to ensure the EPA is not waiving states' authority or rights to citizens suits by resolving all claims or causes of actions that can be brought under Clean Air Act.

• The EPA should inform the state when the facility enters into and complies with this Program.

• The EPA's proposal states that "a company may choose to enter into a parallel audit

agreement with a state that has a state audit policy." The commenter stated that while this statement seemingly reflects the EPA's commitment to cooperative federalism, we are concerned that it may not sufficiently avoid the imposition of a duplicative federal program in states with their own audit programs.

• Why is the EPA proposing to prescribe any model requirements in a state with delegated Clean Air Act authority and an audit program? Could this aspect of the EPA's proposal be simplified and made more consistent with the Agency's approach to cooperative federalism by simply deferring to state audit programs?

• Multiple commenters were concerned that the EPA is imposing its own Audit Policy on top of state audit programs. The Draft Agreement should include express language saying that if the company is proceeding under a state audit program, the EPA will not require the company to do the EPA's program.

• The Draft Agreement will unnecessarily intrude into state regulatory programs and state audit programs.

• Multiple commenters suggested that the EPA should view compliance with state audit programs as compliance with EPA audit requirements. The EPA should decline to impose penalties and offer the same assurance against future enforcement as it would under its own program.

• The EPA should defer to state audit programs. Texas audit program is an example of a good program; this Program follows the punitive Colorado model.

• Consider the EPA Region 8 Regional Administrator's state immunity and privilege efforts.

• If a state already has its own self-audit program then the oil and natural gas producer should only have to work with the state. If the producer develops an audit-based compliance agreement, that agreement should protect it from EPA enforcement actions if the producer complies with the commitments. The EPA should only monitor a self- audit program if the state does not have a self-audit program.

• Multiple commenters stated that the EPA should clarify whether and to what extent a company has to enter into audit agreements with both federal and state regulators, and the extent to which one agency would recognize an agreement with the other.

• The EPA should delegate the audit policy program to state agencies for day-to-day compliance monitoring otherwise there will duplication between the EPA and state regulators.

• Appendix B is an amalgamation of varying elements of regulation form different states and EPA's consent decree relating to Subpart OOOOa. Custom and individualized regulations from state to state are needed.

• The EPA should consider small and medium sized companies because these companies have small staffs and a convoluted or labor-intensive process does not meet the goal of usefulness to operators.

• The EPA should look to the Texas self-audit program as a model.

Comments about Policy Considerations

• This Program contradicts Executive Order 13783 and could impose severe unintended consequences and burdens on participants and non-participants.

• Withdraw the Program in current form.

• The EPA should produce a guidance document or a policy memorandum regarding the Program.

• The EPA should implement a broader program that would require periodic environmental audits by operators as opposed to just when the property is newly purchased.

• Multiple commenters suggested that the EPA expand the Program to cover other industry segments, specifically midstream and transmission segments of the oil and natural gas industry, and other environmental media.

• The Audit Policy is an important tool in furtherance of environmental compliance and the commenter appreciates the EPA's interest in adopting a more flexible approach to

eligibility and administration.

• The Clean Air Act has an inherently complex multijurisdictional approach to regulation and adopting the most aggressive requirements is not an appropriate way to mitigate this complexity.

• The EPA should not limit the audit to the Clean Air Act only: allow for application to the Safe Drinking Water Act, the Clean Water Act, etc.

• One commenter supported EPA efforts to streamline the audit program.

• This Program is an important tool in furtherance of environmental compliance.

• A voluntary program is not a substitute for mandatory compliance and it is not a mechanism for enforcement. The EPA cannot meet its objectives by shifting away from holding polluters accountable.

• Auditors should look for all emissions, not just volatile organic compounds (VOCs) including methane, other hydrocarbons from open hatches, leaking seals, careless operation, poor maintenance, start up and shut down operations, and during Normal Operations. Because methane and other hydrocarbons are not being monitored, it may difficult for auditors to distinguish between VOCs and methane.

Comments about Changes to the Comment Period

• The comment period should be extended to July 5th.

• The comment period extended past July 2nd.